ROBERT S. MARX LECTURE

THE CONFIRMATION MESS, CONTINUED

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The subject of this lecture is "the confirmation mess"—a topic on which I have written before. In the past, like other academic students of the confirmation process, I have paid attention principally to battles over nominees to the federal judiciary, especially the Supreme Court. I have criticized the trend toward screening potential Justices based on their likely votes. Although I recognize that many disagree, on the left and right alike, I have argued that this tendency poses a threat to the constitutional ideal of judicial independence and, if it becomes our consistent habit, vitiates the arguments in support of judicial review.[1]

Recent events have suggested the possibility that more and more cabinet nominees might find themselves subjected to a degree of scrutiny that heretofore, rightly or wrongly, has been deemed the due only of candidates for the Supreme Court. Just two days after his inauguration, President Bill Clinton withdrew his nomination of Zoe Baird to serve as the United States Attorney General; his staff then floated the name of federal judge Kimba Wood, which was just as quickly unfloated. In both cases, problems surrounding the employment of a nanny were said to "disqualify" the nominee.

His third nominee, Janet Reno, was dogged by scurrilous rumors that spread across Capitol Hill—and the newspapers—like wildfire, repeated without any verification. The rumors turned out to be false, but nobody apologized for printing them: their news value, it seems, and hence the public's fabled right to know, did not turn on whether they were true. A lobbyist for a Beltway interest group admitted spreading them and was dismissed; Reno was quickly and properly confirmed.

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1. *See generally* Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759 (1991); Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962 (1990) [hereinafter Carter, *Confirmation Mess, Revisited*]; Stephen L. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988) [hereinafter Carter, *Confirmation Mess*].

Other cabinet nominees (although, as will be seen, not many) have also found themselves "disqualified" over the years. Two of the more recent are John Tower, whose nomination by President George Bush for Secretary of Defense collapsed under the weight of charges of womanizing and excessive drinking; and Theodore Sorensen, whose nomination by President Jimmy Carter for Director of Central Intelligence was withdrawn in the wake of assertions that he lacked experience, was a pacifist, and had used secret documents in writing about the Kennedy administration.

It is not my purpose in this lecture to rehash the charges and countercharges that arose in any of these cases; nor is the lecture a brief on behalf of any particular nominee.[2] Rather, it is my aim to use the controversy surrounding the Baird nomination, in tandem with some other past battles over judicial nominations, to illuminate the notion that an aspect of an individual's past might disqualify her from public service, or, at least, public service requiring Senate confirmation. In particular, I shall argue that we must regain the ability to balance the wrongs that a candidate might have done against the strengths that she might bring to public service—an ability that has tended to atrophy in an age in which we allow the mass media to play the role of guardians of public morality.

The trend toward searching for disqualifying factors means that we have become less interested in how well a nominee for a cabinet position or the Court will do the job than in whether the individual deserves it, as though the vital question is whether the candidate should get the chance to add the post to her resume, which simply reinforces public cynicism about motives for entering public life. We have come to treat public service as a reward rather than a calling, which takes us down a rather dangerous road, for it becomes impossible to bring any sense of proportionality to bear on the evaluation of potential officials.

Further, the search for disqualifying factors potentially leads to a rather freewheeling investigation—largely media-led—into the backgrounds of nominees. The possibility of keeping one's private life private becomes virtually nil, as only the tissue-thin wall of news judgment stands between the nominee and disclosure (and condemnation) of whatever the candidate might least wish to discuss. This might seem just fine, until you take the time to consider (as I shall below) some of the things that might be disclosed in later cases.

2. I am constrained to add that I know and much admire Zoe Baird, who would, I believe, have made a fine Attorney General.

To be sure, there are some facts about an individual's background that *should* be disqualifying, but I fear that recent history has shown us to be a bit mixed up about what they are; consequently, I close the lecture by suggesting which purported disqualifications should be easily curable, which should be curable with difficulty, and which should never be curable at all.

I. THE DISQUALIFICATION GAME

Perhaps it is only our imagination that suggests, in this constantly televised age, that today's confirmation hearings are rougher than those of the past. Perhaps there has been no era in our history when trashing the candidate—"digging up dirt"—was anything other than the order of the day. Yet it is difficult to imagine that those who wrote and ratified the Constitution, when they designed the balance of power between the executive and legislative branches in the appointment process, envisioned quite the mess into which we have worked ourselves.

Our sense of reasonable proportion has gone the way of all other accoutrements of public moral dialogue. We are capable in public life of moralizing, but not of morality. Our puritanical fervor burns brightly at our oddly chosen moments of national condemnation: in a nation in which public officials have been complicit and sometimes willful in the collapse of the inner-city schools that educate millions of poor children, we are incensed because a potential Attorney General failed to please all elements of our labyrinthian federal bureaucracy in her employment of household help. That Zoe Baird did wrong is undeniable; where that wrong ranks on the scale of national scandal, however, is something we have been strangely unable to fathom.

We have been caught up in "baby boomdom"; in an era when the quest for the perfect resume seems entirely adequate as the definition of a life well-lived, we have fallen into the trap of presuming that public service is simply another stop along the route. When we consider who should serve the nation in our governmental apparatus, we treat the inquiry as one involving moral desert: has the individual earned a place, or has the individual exhibited some behavior that is disqualifying? These are the questions that we ask nowadays and, for cabinet nominees, they seem to be the only ones that matter. For better or worse, we ask Supreme Court nominees for their views on a variety of substantive legal questions; but cabinet nominations have long been treated with a deference that makes searching policy inquiries seem to be in bad taste. Thus, we may ask the Commerce Secretary-designate about his position on the best

scheme for reducing the trade deficit with Japan, and we might quiz the Attorney General-designate about her views on protecting abortion clinics from over-zealous protesters, but the Senate rarely votes on such issues. The Senate votes the nation's moral fervor instead; we hold referenda on how bad a person the nominee is.

In this sense, our modern approach to the confirmation process is much like the ban on service by gay and lesbian citizens in the military. The military ban (which, unfortunately, is still in force) is categorical. It leaves no space for balance. We do not ask what qualities gay or lesbian soldiers, sailors, or pilots might bring to military service, or whether they might serve the nation with honor. We ask, rather, whether they have engaged in conduct—sexual love within, rather than across, gender lines—that offends some people's morality.[3] And that is all we wish to know: once we have found that "disqualification," our inquiry ends.

The Presidents who nominate feed the disqualification game, with their disingenuous but perfectly understandable insistence that every nominee for every position is the best, or among the best, qualified. (Frequently, they use these very words.) The implication of such rhetoric is that a concrete set of requirements for the job—the paper qualifications—somewhere exists. *Many candidates have been screened*, the President is implying, *and my nominee fits best*. It is as though the nominee's resume is the principal, perhaps the only, justification for the nomination and, thus, for confirmation and for the appointment itself. If this bit of presidential puffery is disproved, then one might literally say that the formerly qualified nominee has now been *disqualified*.

But the approach that divides nominees into only two categories, the deserving and the disqualified, is bad for our government. The scrutiny we now require before allowing willing professionals to become public servants is likely to weaken, not strengthen, our institutions. There is much to be said for keeping government free of the taint of scandal, but not for creating scandals to keep our government free of people we do not like. Moreover, in our rush to treat virtually any bit of wrongdoing as proof of moral unfitness, we have lost the sense of balance that is vital to a vibrant, functioning de-

3. Lest the reader protest that homosexuals have done nothing wrong, whereas such cabinet nominees as Zoe Baird have broken the law, I would remind that there are places—many—where sexual relations between adults of the same sex is illegal. These laws are cruel, and the Supreme Court, in my judgment, erred in failing to rule them unconstitutional in Bowers v. Hardwick, 478 U.S. 186 (1986), but that does not change the fact that they are the laws. Most of the offenses charged against Zoe Baird (as will be seen) also fall into the category of violation of cruel laws.

mocracy—a sense perfectly captured in the words of our greatest President, Abraham Lincoln, who said: "On principle I dislike an oath which requires a man to swear he *has* done no wrong. It rejects the Christian principle of forgiveness on terms of repentance. I think it enough if a man does no wrong *hereafter*."[4]

When I say that the search for disqualifying factors is a bad thing, I do not mean to suggest that nothing the search turns up should be allowed to count. Facts, after all, are facts. (You can probably guess that I am not a big fan of the "exclusionary rule" in criminal procedure.) For example, supporters of Clarence Thomas have charged that there was an open but despicable nationwide campaign to dig up "dirt" on him, involving phone trees, burrowing researchers, even a few advertisements. The notion of such a campaign—if it existed at all—is repulsive, but that does not mean that what diligent searching turned up should be discounted. Millions of Americans (the majority in some recent surveys) believed Anita Hill's charges of harassment.[5] Some have argued that Hill's charges themselves might not have been disqualifying, but one who believed them could reasonably conclude that Thomas's denials, under oath, were by themselves reason enough not to confirm.

Clarence Thomas, of course, was a Supreme Court nominee, and we have come to expect bitter battles when seats on that tribunal become vacant. Cabinet nominations, however, have traditionally been handled by the Senate with kid gloves, at least until the last two decades. As we shall see, until recently, the handling has been so gentle as to make nomination to a cabinet post virtually tantamount to appointment. The fate of the Baird nomination, as well as some fascinating data to which we shall turn shortly, suggests a much closer scrutiny of cabinet nominees as well. Probably, this is as it should be; the tradition of strong deference to presidential cabinet choices was never as historically or constitutionally grounded an idea as rhetoric about letting the President select "his own team" made it sound. Senatorial confirmation was not designed by the Founders to be used as a rubber stamp. On the contrary, the Founders understood what the Congress has only intermittently realized, that the confirmation power was to be a check on the President's freedom to staff the government and, hence, on his policies.

But if we are to play the disqualification game, we should at least try to be sensible about it. Right now, the game proceeds in accordance with no rules whatsoever. The brouhaha over the Baird nomi-

4. HAROLD M. HYMAN, TO TRY MEN'S SOULS 188 (1960) (emphasis in original).

5. I also believed the charges without reservation. Anita Hill, a long-time friend, is as truthful an individual as I know.

nation shows the inconsistency of our moral indignation, which strikes, cancer-like, almost randomly. Among Zoe Baird's recent predecessors as nominees for Attorney General was one who was accused of arranging jobs on the federal payroll for individuals to whom he was financially indebted. The story scarcely stirred the interest of the nation's press, to say nothing of the fury of the nation's voters. Perhaps the story was not even true—Edwin Meese, the nominee in question, certainly denied it—but it is nevertheless remarkable that so little outrage greeted the allegations, if, as now appears, the identity of one's nanny is a matter of national moment.

II. THE COURT: RECENT HISTORY

As I have already noted, cabinet nominees are not the only ones who face the disqualification challenge. Supreme Court nominees traditionally have endured close scrutiny. John Rutledge, nominated by President George Washington for Chief Justice, was forced to confront charges that he was mentally incompetent; charges, many argue, that were smoke screens for political objections. Whatever the truth of the charges, they did their damage: Rutledge was not confirmed. (He subsequently attempted suicide.) In recent years, although some have insisted that we should keep the battles over judicial nominees in the arena of issues,[6] the question of moral fitness has often been very much a part of those inquiries. Given the authority that we delegate to the courts, this is scarcely surprising. But, like the screening of cabinet nominees, the examination of candidates for the Supreme Court sometimes gets out of hand. When it does, the supporters of the nominee in question always insist that his or her reputation has been trashed—and sometimes, it is true.

This is hardly the place to write a history of the contentious battles that have marked the Supreme Court appointments process; that work has been done, many times over.[7] What might be useful is to draw a line to mark the beginning of the present era. Given the

6. Whether that is the proper plane is a question I have taken up elsewhere, perhaps more often than is strictly necessary. *See* Stephen L. Carter, *A Litmus Test for Judges? It Demeans the Court*, N.Y. TIMES, Apr. 28, 1993, at A5 [hereinafter Carter, *Litmus Test*]; Stephen L. Carter, *The Candidate*, THE NEW REPUBLIC, Feb. 22, 1993, at 29 [hereinafter Carter, *The Candidate*]; *see also* sources cited *supra* note 1.

7. *See, e.g.*, PAUL SIMON, ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES (1992); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF JUSTICES CAN CHANGE OUR LIVES (1985); CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1923); Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

nation's racist history, it should be unsurprising that the tradition of trashing Supreme Court nominees—of using any argument, whether or not based in fact, to smear the reputation of a potential Justice—began in earnest with the first black nominee, Thurgood Marshall. To be sure, the fine tradition of vicious whispering campaigns goes back at least as far as the nomination of the first Jewish Justice, Louis Brandeis, in 1916 (which might simply be more evidence of racism). And, in 1957, William Brennan, nominated by President Dwight Eisenhower, faced allegations from Senator Joseph McCarthy that he was soft on communism, evidently because he had had the temerity to criticize the inquisitorial activities of some congressional committees.[8] But only in 1967, when Marshall was nominated by President Lyndon Johnson, did the art of trashing touch the pinnacle. Indeed, conservatives who believe what Robert Bork or Clarence Thomas suffered was unprecedented in our history should stop wallowing in unnamed sources and take the time to read the transcript of the Marshall hearings, where it was the right—not the left—that spent the summer tossing mud.

I have written about Marshall's confirmation hearings in some detail elsewhere and will not trouble to repeat that analysis here.[9] Let it suffice to say that everything from how he had written the briefs in *Brown v. Board of Education*, to what books he cited in his opinions, to what schools he selected for his children to attend became—for his more intemperate critics—evidence of his lack of personal morality. The actual ground for the opposition was politics—his opponents were mainly segregationist senators and their allies—but the smoke screen, as so often, was character.

Nowadays, trashing of this sort is almost expected, which is why everybody girds for it in advance. In the case of judges in general, however, and Supreme Court Justices in particular, we also have an additional "disqualifying" factor—how we expect the nominee to vote. We do not call the factor an anticipated vote; we dress it up with such fancy names as "judicial philosophy"; but, at bottom, the political concern is whether the nominee will vote in ways that will make constituent groups happy. That this factor works in the same way to derail otherwise "qualified" nominees is evidenced, for example, by the comment of Bruce Ackerman—no fan of the Bork

8. *See Hearings on the Nomination of William J. Brennan, Jr. Before the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 5-28 (1957).

9. *See generally* Carter, *Confirmation Mess, Revisited*, *supra* note 1.

nomination—that Robert Bork came to the hearings with one of the most impressive resumes of any candidate in this century.[10]

The Bork hearings, indeed, are instructive for any number of reasons. Bork, it will be recalled, was defeated by a vote of 58-42, by far the largest plurality of votes ever cast against a nominee for the Supreme Court. As virtually nobody challenged his resume or his experience, the case against him rested on the claim that he was disqualified.

And what were Bork's disqualifying sins?

The truth is, although I have made a small study of the Bork confirmation battle—in fact, I have written three law review articles about it[11]—I am still at something of a loss to explain what, other than his predicted votes, constituted the substance of the case against him. Some of his opponents, resting on the plausible but troubling principle that the notion that Bork would vote the wrong way was reason enough to oppose him (just as it is plausible, but troubling, for a President to suppose that the notion that Bork would vote the right way is reason enough to support him), placed their opposition on the ground that he would vote *no* when they wanted a *yes*, and let it go at that.[12]

His most bitter opponents, however, perhaps not satisfied that judicial philosophy alone would play in Peoria, took the evidence of his likely votes and turned it into a series of moral flaws. As I read the rhetoric of his opponents at the time, he wanted to sterilize women or force them into back-alley abortions, or both. He did not believe that black people should sit at the same lunch counters as white people. He thought the government should be in our bedrooms, figuring out whether we were using an illicit means of birth control.[13] And, to top it off, he believed that the Congress had the power to overturn *Roe v. Wade* by a simple statute.

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10. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988) (citing *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, 1987: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 2, at 701 (1987)).

11. *See* sources cited *supra* note 1.

12. For some of the reasons that I consider this approach—by the Senate or the President—to be flawed, see generally Carter, *Confirmation Mess*, *supra* note 1; Carter, *Litmus Test*, *supra* note 6.

13. Although this rhetoric was virtually everywhere, the best-known example is Senator Edward Kennedy's floor speech on the day the nomination was announced. *See* 133 CONG. REC. 18,519 (1987) (remarks of Sen. Kennedy). The point of the speech, which critics denounced as "reckless and intemperate," was to "freeze the Senate," so that members would hesitate before declaring quick support for the nominee. *See* MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION 34, 102 (1989).

Now, these charges were all made against him, some of them in the hearings, some of them on the steps of the Capitol, some of them in television and newspaper argument. And what evidence was there in support of any of them?

Well, actually, not much.

The sterilization charge was based on his opinion for a unanimous panel of the D.C. Circuit that an employer did not violate the Occupational Safety and Health Act by forcing women of childbearing age to be sterilized or face transfer from a hazardous work area and, possibly, dismissal.[14] Now, that is a cruel and perhaps misogynistic policy. But I think it is safe to say that virtually no serious administrative law scholar thinks the opinion wrong, and many prominent Bork opponents, including, for instance, Harvard law professor Laurence Tribe, have said they thought his opinion was right.[15] In any case, Bork was only telling us what he thought the Congress had meant; the transmutation of that into a statement of his own preferences is difficult to fathom.

The charge that he was a defender of segregation was based on a rather thoughtless little essay that he tossed off in *The New Republic* while a relatively young scholar, explaining why, in his view, the Civil Rights Act of 1964 violated the property rights of the restaurateurs and innkeepers who would be forced to integrate their places of business. Let us agree that what he proposed was badly wrongheaded, even cruelly insensitive in its inversion of the relevant rights. Congressional reliance upon his approach would have done incalculable damage. Still, he wrote the article rather early in his scholarly career, more than two decades, in fact, prior to his nomination. As a mature scholar, he subsequently repudiated it—albeit not with quite the degree of contrition that many of us would have preferred. Still, most of us have written silly essays as young scholars, and some of us, supposedly mature, still do—occasionally even in *The New Republic*.

The claim that he wanted the government in our bedrooms, checking to see what form of contraceptives we might use, was based on his perfectly sensible argument that Justice Douglas' opinion to the contrary in *Griswold v. Connecticut*[16] was not convincing. I do not say that I think Bork's critique was correct; I think *Griswold* a better opinion than its many critics do. But to treat Bork's critique

14. Oil, Chem., and Atomic Workers Int'l Union v. American Cyanamid Co., 741 F.2d 444, 445 (D.C. Cir. 1984).

15. ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 179 (1989).

16. 381 U.S. 479 (1965).

as outside the mainstream is ridiculous, and to go on to say that because he does not believe that there is a constitutional right to birth control he therefore must not believe in birth control is, shall we say, disingenuous. True, it is possible to create constitutional theories in which judges should be (or even cannot help but be) guided solely by their policy preferences, but those theories have little to do with the function of the judicial branch in a constitutional democracy. Consequently, absent very strong evidence to the contrary, we should not assume that a statement of constitutional theory *is* a policy preference.

Which leads us to abortion. It is true that Bork has heaped contempt upon the opinion in *Roe v. Wade*.[17] But he is hardly alone in having done so; indeed, the critics of *Roe* include scholars who are pro-choice in their politics, as well as many others who can hardly be dismissed as right-wing ideologues. So disagreeing with the Court's reasoning—even doubting whether any rationale will support the result—hardly makes one a dangerous radical.

Let me dispose of a second abortion bugaboo. A few years ago, a pro-life scholar named Stephen Galebach proposed the enactment of what he called the Human Life Bill, a federal statute that would have defined conception as the point at which human life begins and thus overturned *Roe*. Galebach believed, for reasons I do not trouble to detail here, that the statute was within the constitutional power of the Congress. Few mainstream scholars agreed. According to Bork's opponents, he was one of the few. But this charge was not a simple distortion—it was actually false: Bork had testified that the Human Life Bill would be unconstitutional.[18]

But I digress. My point is not to refight the Bork battle after all these years, and reasonable minds certainly may differ over both the significance and the relevance of all these different allegations. Still, note what they have in common. Through their rhetorical elevation from disagreements over legal doctrine to important character flaws, they become tools for demonstrating that the nominee is morally venal, rather than simply that he would vote in ways that the

17. 410 U.S. 113 (1973).

18. Bork's opponents would have done better to focus on the reason he offered for unconstitutionality, rather than claiming that he was on the other side. He considered the bill unconstitutional because it was to be enacted pursuant to the same congressional authority that enabled the Voting Rights Act of 1965—an authority, said Bork, that the Supreme Court had wrongly supposed the Congress to possess. I disagree with him on the Voting Rights Act, but that is not the point. The point is that if one indeed cares about a nominee's votes in potential cases, this might have been a stronger place to stand.

critic dislikes. In effect, they represent the very essence of the search for disqualifying factors.

If I believed the opposition to Bork was based on a perception that he was closed-minded, I would have thought it both principled and legitimate, however much I might have disagreed with the characterization. I fear, however, that the case was based on a perception that he was closed-minded *in the wrong direction*—just as many of his supporters believed him to be closed-minded in the right direction.

Again, I have written elsewhere about why I worry that this particular disqualifying factor threatens judicial independence. The short of the matter, for reasons that should be too obvious to need explication, is that we are better off with judges who make up their minds after hearing arguments rather than before. Besides, the constituent groups that argue that this assertedly "democratic" check on the Court is necessary probably do not mean it. I suspect that they would be terrified at the thought of actually allowing the democratic processes, rather than Beltway insiders, to decide which judicial decisions the nominee should "promise" to preserve, protect, defend—or overturn—which helps explain why the nominee's purported disqualifications are stated in such apocalyptic, headline-grabbing terms.

III. The Cabinet: A Smaller, Longer History

As it turns out, not much has been written in law reviews about the selection and confirmation of cabinet officers. One reason might be that they are rejected so rarely. In fact, until the presidency of Rutherford B. Hayes, it was quite rare for a cabinet nominee to be rejected by the Senate, mainly because—in line with the Founders' conception—the nation spent its first ninety years with a cabinet selected in part by the Congress. The leading members of Congress told the President whom to place in his cabinet, and, after some negotiation, that was that. Presidents who fought the congressional will found their nominees battered, as, for example, Andrew Johnson's Treasury nominee, Roger Taney. President Hayes, not satisfied with undoing Reconstruction, also had no patience with congressional domination of the appointment process. He refused to nominate the candidates pressed on him by powerful members of Congress, and the Congress itself—riven with internal turmoil as the Reconstruction Era slipped, like magic, into the Gilded Age—lacked the backbone to stand up to him.

In some respects, this was probably an improvement, because the presidency of the first half of the nineteenth century was far too

weak. But the growth of executive power between the Civil War and World War II led to a situation that went too far in the other direction: congressional opposition to any presidential nominees, other than to the judiciary, became rare. And from 1945 to the present time, we have lived under a strange system in which it is customary to allow the President to appoint what is usually called "his own team," which, in effect, means that his nominees for cabinet posts receive only very slight scrutiny. Indeed, prior to the withdrawal of the Baird nomination, only four cabinet-level nominees (out of 230) since World War II failed to gain Senate confirmation. Of these, two were defeated and two withdrew. (If one includes as a cabinet-level post the Director of Central Intelligence, there have been two additional defeats or withdrawals.) Only one in nine nominations in that period failed to receive the affirmative votes of at least ninety percent of the Senators.[19]

That does not mean, however, that the sledding for cabinet nominations has been easy. Indeed, precisely because it is so rare for cabinet nominations to be defeated or withdrawn, some social scientists have proposed testing the level of opposition rather than simply the rate of approval. Political scientists James D. King and James W. Riddleperger, Jr. have demonstrated that the percentage of affirmative votes has been falling since fears of the imperial presidency were aroused in the seventies, and the likelihood of Senate rejection has grown. Consequently, there is reason to think that the Baird brouhaha is less an aberration than a portent of things to come.

IV. A WORD ABOUT "NANNYGATE" . . . AND THE FORGOTTEN CONSTITUTION

Before discussing how to deal with the future into which we may be so recklessly stepping, it is useful to pause for a moment and marvel at the peculiar fact that nobody, even in our rights-conscious society, has seriously questioned the propriety of senatorial, journalistic, or other public inquiry into a nominee's child-care arrangements. The centerpiece of our national outrage was the simple conclusion that the potential Attorney General broke the law. It is not as obvious as our opinion leaders made it appear, however, that this fact alone is always disqualifying—or even, indeed, that it is necessarily anybody's business.

19. *See* James D. King & James W. Riddlesperger, Jr., *Senate Confirmation of Appointments to the Cabinet and Executive Office of the President*, 28 SOC. SCI. J. 189, 192-93 (1991).

To understand the point, suppose a nominee who had broken a very different law—one who had obtained an abortion at a time and place where the practice was illegal or who had engaged in consensual sexual activity with an adult of the same sex at a time and place where such activity was illegal. It is difficult to believe that the guardians of national morality—here I have in mind not only the press and the pundits, but also the leaders of our various interest groups—would have created such a stir. On the contrary, we would presumably have been told that even to inquire into such matters would be a violation of a fundamental right to privacy—and I think that argument would be correct. Therefore, it is not the case that every violation of law should lead to a moral judgment of unfitness for office. In the examples mentioned, the privacy right of the nominee would intervene.

Very well, what about what has come to be called the "nanny problem"? The answer resides in separating the three most common "nanny problem" offenses, for they are not the same. One offense is the failure to pay Social Security taxes on the sitter's wages. Another is the failure to report the sitter's wages to the Internal Revenue Service. A third is the knowing decision to hire an alien who lacks proper documentation (or, what is also a legal violation, the failure to determine prior to employment whether the nanny is legally entitled to work).

Are any of these also covered by privacy rights? The answer depends critically on one's view of the home and the life of the family. In our traditional legal iconography, home and family life have been deemed central to civil society. In his separate opinion in *Poe v. Ullman*, Justice John Marshall Harlan—certainly no liberal activist—argued that the Court should apply the strictest scrutiny when the state seeks to regulate what goes on in the privacy of the home.[20] He added that the Third and Fourth Amendments protect "the physical curtilage of the home . . . as a result of solicitude to protect the privacies of life within."[21] Because Justice Harlan was writing about contraception, one might argue that the "privacies" in question only involve the sexual relationship of husband and wife. But it is difficult to imagine that our constitutional solicitude for choices about childbearing is greater than our constitutional solicitude for choices about childrearing. After all, the Supreme Court said in *Meyer v. Nebraska* that among the most fundamental of constitutional

20. 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

21. *Id.* at 551 (Harlan, J., dissenting).

rights are the rights "to marry, establish a home, and *bring up children*."[22]

Once one accepts that the home is the rock on which society is built, the nanny problem begins to lose the elegant simplicity that helps sustain the outrage. Matters are much more complex. We are, fortunately, well past the days when it was said that the king's writ did not run into the home—which meant that husbands could beat wives and children without official restraint—but the home is still surrounded by a political and philosophical mystique. Just as fortunately, we are past the days when only one form of human arrangement was described as the "family" on which the idea of home critically rests. These positive changes make no essential difference in the importance of home as a place free of all but the most vital state intrusions. Thus, even today, the state should intervene rarely and, when it does, it should do so only for the protection of someone else; never, in Kantian terms, to make people into means rather than ends.

Some courts, recognizing the specialness of the home, have ruled that the state lacks power to regulate the possession or use of otherwise illegal drugs within those four walls. One need not share that view to understand that the home, in our jurisprudence, remains clothed in a specialness that other venues lack. Indeed, when the Supreme Court in *Griswold v. Connecticut* sustained the right of married couples to use contraceptives, Justice Douglas' majority opinion concluded with a rhetorical question—and a firm answer: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[23] A few years later, when the Court upheld, in *Stanley v. Georgia*, the right of individuals to possess obscene materials in their homes, Justice Thurgood Marshall wrote for the unanimous Court: "[I]f the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[24]

None of this is to say that a state decision to regulate parts of a family's childrearing choices is unconstitutional. But when set against the moral traditions of the nation, the state interests in enforcing the various laws at issue must at least be considered somewhat weaker. Thus, even if the laws are constitutional, there are moral and political questions to be resolved.

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22. 262 U.S. 390, 399 (1923) (emphasis added).
23. 381 U.S. 479, 485-86 (1965).
24. 394 U.S. 557, 565 (1969).

Given this analysis, the safest answer is that only the first of the three offenses—failure to pay the nanny's Social Security taxes—is obviously the government's business. The reason is that the requirement that the employer pay Social Security taxes is intended to protect the employee; the fact that the employment takes place within the four walls of the house and in the context of child care, over which the parents have plenary authority, does not give the parent-employer any right to take advantage of the employee. The same would be true for minimum-wage or maximum-hour laws. In other words, to protect employees from abuse, the sovereign's writ runs into the home.[25]

But the other two requirements—that families report to the IRS what their nannies earn and that they ascertain their nannies' immigration status—would, in a sensible society, be beyond the government's power, except perhaps for the most extreme cases. In demanding that parent-employers check the nanny's work eligibility or report the nanny's earnings, the government is not seeking to protect against abuse *of* the employee; rather, the government is seeking to protect against abuse *by* the employee. In other words, the government is trying to ensure that the nanny does not escape the tax or immigration laws. Enforcing those laws is of course the government's business; but conscripting families, in the privacy of their homes and the sanctity of their childrearing, into assisting in that enforcement is not.[26]

Would we allow the police to search the sacred precincts of children's bedrooms for telltale signs of illegal employment? One would hope not; here, one would like the home, and the choices a family makes about childrearing, to be sacrosanct. It is no answer to say that there is no physical search but only a reporting or payment requirement, for even in Justice Douglas's lyrical opinion in *Griswold*, the search was only a metaphor for the intrusion itself.

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25. Although the state may have a valid interest in enforcing its Social Security laws for individuals who provide child care in the home, it is not clear that the state always *should* do so. As the law now stands, the requirement is triggered whenever the worker—say, the babysitter—earns $50 in any quarter. The Social Security payroll tax is a regressive transfer of income in the best of cases (lower-wage workers pay a higher percentage of their income than higher-wage workers), but to require part-time babysitters who earn $50 in a single quarter to help support older individuals who have already recovered all of their Social Security contributions, plus interest, is not simply regressive. It is a cruel disincentive to work, so cruel that it is hard to see why disobedience *at the employee's behest* should be considered immoral.

26. Consequently, our national compromise seems to have things precisely upside down. It has chosen to be forgiving, as far as the Senate will allow, for failures to pay Social Security taxes, but seems adamant—as witness Kimba Wood's unfortunate experience—on the issue of the employment of illegal aliens.

V. The Risks of the Game

The public, of course, did not see matters that way—not, at least, at the time. At the time, the wave of popular disapproval washed over the Baird nomination so swiftly that even the vaunted news media seemed taken by surprise, and Washington politicians, struggling to keep their heads above the roiling tide, told the President that the nomination was dead. Indeed, for a brief moment of history—a moment, unfortunately, that trapped the eminently qualified Judge Kimba Wood, who was thought to have the inside track as the next nominee—we seemed to have defined a new moral issue for the future. Illegal child care arrangements, it seemed during that moment, would prove even more of a barrier to public service than membership in discriminating organizations—for when a nominee belongs to a club that excludes black members, we allow a resignation to cure the problem.

But there is reason to think that the public, like the press and the politicians, has backed off. At least one other cabinet official who failed to pay Social Security taxes on a domestic employee has been allowed to keep his seat, and this without a murmur of complaint. A prominent lawyer who had similar difficulties and, according to news reports, was therefore out of the running for a post requiring Senate confirmation, has since been nominated for a high position in the Justice Department. Once more, the press and the public have been silent. Even the radio talk show hosts seem bored.

One way of explaining all of this—the best way, in my view—is that we as a nation are admitting in our sheepish, indirect way that we made a mistake in elevating Zoe Baird's admitted legal violations in arranging child care to the level of national scandal. Perhaps there was no scandal, only—how much more mundane!—two parents who were trying to do what they thought best for their children. By deciding that the violations are no longer as character-defining as we briefly allowed ourselves to pretend, we may be showing our own national maturity. Indeed, we may yet grow out of the instant-opinion-survey business altogether, which would not be such a bad thing.

The case of Kimba Wood showed, if anything, an over-sensitivity to the opinion survey. The record should reflect that it is very hard to find anything that she actually did wrong. True, she hired a nanny who had no legal right to be in the country, but she did so at a time when it was legal to do so. True, she told the President's people that she lacked what is unfortunately known as a "Zoe Baird problem," but that was the unvarnished truth, for Wood violated no law. Of course, what the President's people had in mind was finding

out whether Wood had anything that would be a public relations problem. Once they learned of the status of her ex-nanny, they seemed to decide that the public could not make the distinction.

Public opinion surveys made mock of the notion of a public too foolish to tell the difference, as most of those questioned told pollsters that Wood, in their view, had done nothing wrong. But there lies one of the fascinating problems with our strangely heavy reliance on the instant survey. The President's people had to make up their minds—and the President his—before any survey data was available, and, indeed, before there was a Wood nomination (for Kimba Wood, you will recall, was never actually nominated). Had they waited, they might have learned something.

It is, however, very much in the nature of the search for the disqualifying factor that we are impatient. When Anita Hill charged that Clarence Thomas, while her supervisor at the EEOC, had sexually harassed her, most instant surveys showed that a majority of the public believed Thomas, not Hill. In evident reliance on the surveys, the Senate voted to confirm. Now, a year and a half later, the surveys tell us that a majority of the public believes Hill, not Thomas; in fact, a majority says that Thomas should not have been confirmed.[27] A lesson lurks there somewhere, but it is one too depressing to ferret out. Perhaps the lesson has to do with deciding whether elected representatives should vote our views or their own.

If Thomas was buoyed by instant surveys, another controversial candidate, Robert Bork, was demolished by them. By the time his hearings ended, the public had turned sharply against him. Nobody actually believes today that Bork would have voted a harder right line than Justices Antonin Scalia or Clarence Thomas—but it was Bork whom the surveys did in.

In our democracy, the voice of the people obviously matters. But it is an absurd notion that we promote democracy by paying close attention to—perhaps even granting decisive weight to—instant surveys based on the public's unconsidered judgments. Both in theory and in practice, there is a distinction between democracy and mob rule. If we continue to miss that distinction, we will continue to drive capable people away from public service—a considerable cost with no corresponding benefit.

Now, I have heard it said that it does not matter if the process that we have created scares away from public service some people who

27. Just as the existence of pro-Thomas surveys at the time is not strong evidence that the Senate was correct in confirming him, the existence of more recent anti-Thomas surveys is not strong evidence that the Senate was wrong.

would be good. It does not matter if *A* is knocked off unfairly. There is always somebody else—*B*—who will come forward with all the same qualifications as *A*, and none of the shortcomings. Or so the story goes.

But the somebody else who is out there and who, in theory, will do such a great job, might be scared away too. Or, if not scared away, that somebody else might sit for confirmation and be treated just as shabbily. (One must remember the words of Senator Joseph Biden, the Democratic chair of the Senate Judiciary Committee, who stated in the mid-1980s that he wished President Reagan would send up the name of a "principled" conservative like Robert Bork, who would, quoth Biden, be confirmed with no trouble.) That is why the idea that it is okay to lose outstanding public servants because there are so many out there is a little bit like the story of the car dealer who sold every vehicle at a loss, figuring that he would make it up on volume—a good way to go broke.

Similarly, choosing in our arbitrary, haphazard manner to dump nominees over relatively minor sins is a sure route toward scaring most good people away from public service. You cannot cure bad decisions by saying that there is a chance down the road to make more.

VI. Playing by the Proper Rules

This is not to say that no single factor should ever be taken to disqualify anybody from any post. I argue only that we should not presume that because we have found wrongdoing, we already have the answer to the disqualification question.

I have proposed that we try harder to balance the wrong that an individual might have done against the good service that he or she might bring to the nation. The well-known weakness of balancing tests is that they rarely indicate the relative weights to be assigned to the different factors that are balanced. In the interest of trying to alleviate that difficulty here, I will set forth a spectrum of potentially disqualifying behaviors, ranging from those that should require the most additional evidence before they can be cured to those that should require the least.

First, I should say a word about what I am not discussing—that is, disqualifying factors that are beyond the scope of this paper and, indeed, beyond the reach of practical solutions. I exclude cabinet nominees who are defeated or withdrawn because of explicitly stated policy disagreements. Consideration of disputes of this kind is entirely appropriate in casting a vote, and I only wish the Senate would do it more often. (As should be clear, I do not exclude judi-

cial nominees on this ground.) I also exclude nominees who lose out because they are caught in a crossfire between the President and Congress over other, possibly unrelated, issues. Although I naturally feel sorry for nominees who are shot down for reasons unrelated to their own qualifications—indeed, sometimes unrelated to the departments they would serve—such losses as these are a consequence of politics and therefore both unavoidable and, in a sense, healthy. Finally, although I believe firmly in seeking diversity in appointments, I exclude from this discussion the possibility of rejecting candidates because they are of the wrong race, sex, or religion.[28]

But the plausible grounds for rejection that remain cover a vast ground. For the sake of convenient understanding, I would propose to divide potentially disqualifying factors into five categories. I do not pretend that what I am doing is entirely new, or, perhaps, entirely comprehensive. As will be seen, however, it is an important aid to the analysis.

Category 1—Qualifications for the Job: My reference here is entirely to the candidate's resume. Does the candidate have the basic ability and relevant experience? How does the candidate compare with others who have held the same position?

This is the single point that ought never be curable; that is, a nominee who is patently unqualified for the job should never be confirmed. Oddly, however, in the absence of ideological warfare or simple racism, we seem unable to argue in these terms. Thus, for example, Senate opponents of Thurgood Marshall, unembarrassed about defending racial segregation, were not reluctant to claim that he lacked the minimum qualifications for the job, even though, in light of his resume (which included victories in twenty-nine of thirty-two cases argued in the Supreme Court), the claim was patently ridiculous.

Some nominees who were opposed on the basis of their lack of qualifications were indeed unqualified. G. Harrold Carswell, nominated by President Nixon, fits that category, and the Senate swatted him aside with almost casual ease. More often, however, the question of qualifications, even for the Supreme Court, is treated as something too insulting to mention. No one is ever not smart enough, not experienced enough, not even-tempered enough, not open-minded enough.[29] As to the cabinet, we have so thoroughly

28. For a perhaps overheated discussion of the reasons for my concern, see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 29-45 (1991).

29. I remind the reader that I fear that the left and the right alike use the term "closed-minded" as a synonym for "doesn't agree with me."

bought the myth that the President is entitled to his team that we do not give qualifications much thought. In the rare case in which it *is* mentioned—for example, President Carter's failed nomination of Theodore Sorensen as Director of Central Intelligence—it is almost always a code for something else. In Sorensen's case, the real fear was that because he was a self-described pacifist, he must be soft on the Cold War.

Yet we might spare our nation much agony—and much official incompetence—if we were to develop the simple courage to say to the President from time to time, "No, you may not have this person in your cabinet. It is not that your nominee is immoral. It is not that we do not like your nominee's politics. It is not that we are throwing our weight around. It is simply that your nominee lacks what we consider the minimum qualifications to do the job."

Category 2—Respect of the Public: The view of the public matters because, in a democracy, it is the public's respect for our institutions that must ultimately give them their authority. (The principal alternative—as practiced in much of the world—is, of course, authority at the point of a gun.) If a significant segment of the public loses (or never possesses) respect for the nominee, and if that lack of respect is likely to rub off on the relevant institution itself, the nomination should be withdrawn or—if the nominee insists on a vote—defeated.

This is not a comment on the quality of the nominee, because, as we have seen, the public is often wrong in its moral judgments and is even sometimes ashamed of them later. Thus, for example, Zoe Baird was probably right to withdraw as nominee for Attorney General because the public response, even if unfair, would have hindered her ability to do her job. Similarly, many have argued that Clarence Thomas should have withdrawn as a nominee for the Supreme Court, even if he was telling the truth, because enough of the public disbelieved him that his effectiveness as a Justice and, perhaps, the legitimacy of the Court itself might be compromised.

Unlike the fundamental lack of qualifications, however, a loss of public respect should, in rare cases, be considered curable. The low-risk cure is for the President to spend scarce political capital making a public case for the nominee. This, of course, Presidents have been willing to do only infrequently, because they need their energies for other battles.

The high-risk cure is to confirm the nominee because of a faith that the nominee's performance will be so spectacular that the public will quickly regain the faith that it has lost. Some of Clarence Thomas' supporters, in explaining their affirmative votes in the face of strong (although perhaps not majority) public opposition, made

precisely this argument. Supporters of Edwin Meese, whose nomination for Attorney General ran into difficulties but who ultimately was confirmed, also insisted that once he had the chance to serve, the public criticism—seen as whipped up by a biased media—would fall away.

The reason this cure is high risk is that it requires a difficult prediction regarding future events. Too often, Senators who explain their votes on this ground are probably more wishful than certain. But our public institutions are at risk when the public has grave doubts about the nominee, and wishfulness is no substitute for the cold calculation that sometimes requires our politicians to realize that getting their way will cause more harm than good.

Category 3—Immoral Conduct: Despite what I have said above about disqualifying factors, I should make clear that I think personal morality *does* matter, and matters greatly, when one is deciding how to staff the government. Even though I question whether we have always in the past correctly identified what should count as immoral, I do not dispute the proposition that consideration of the candidate's moral uprightness is a part of the task of both the President and the Senate.

The way one might put the question is this: Has the candidate acted, outside of his or her official capacity, in a way that does not violate any laws and does not violate any professional norms but that nevertheless displays moral obtuseness? The charge that Clarence Thomas sexually harassed Anita Hill might fit into this category. So might the matter of the offensive jokes told by Earl Butz, who, shortly thereafter, was forced to resign as President Ford's Secretary of Agriculture, and James Watt, also forced to step down as President Reagan's Secretary of the Interior. To be sure, the jokes in question were told while Butz and Watt were serving in office, but had similar material come to light during confirmation hearings, the Senate would have acted properly in taking it into account.

Immoral conduct should be curable in some cases; that is, it should not be as difficult to cure as lack of qualification (which should not be curable) and loss of public respect (which should rarely be curable). We must be cautious, however, about what we label a cure. For example, when nominees are members of all-white clubs—that is, when they have made a lifelong habit of relaxing in the company of people who, by choice, avoid people of color—we allow them to cure this immorality by the expedient of resignation. But the problem is the habit of mind that makes membership possible and comfortable, not the fact that the membership exists.

Category 4—Unethical Conduct: Has the candidate violated any norms of the profession, or violated any ethical standard to which we generally hold public officials? I here have in mind the existence of actual standards, with precedents that enable them to be applied in difficult cases. The easiest case to determine is one in which the nominee has actually been adjudged by a competent authority to have violated an ethical norm. This will be true only if the nominee is a member of a self-regulating profession, such as law or medicine, or if—in government service or private life—the nominee has been employed by an institution that promulgates and enforces a code of conduct.

Violations of ethical norms should be curable more frequently than the deeply immoral conduct constituting Category 3, but they are serious matters. Past ethical violations may give more information than anything else about the likelihood of further ethical violations while in government service, a factor which goes to the ability to do the job well.

Many nominees have been accused of ethical violations. Abe Fortas was said to have violated professional norms by accepting a consulting fee (which he later returned) while serving as a Justice of the Supreme Court; as a result, his nomination as Chief Justice stalled, and he was finally forced to resign. Theodore Sorensen was accused of converting secret government documents to his own use; his nomination as Director of Central Intelligence was withdrawn. Edwin Meese, as I have mentioned, was accused of arranging government jobs for individuals to whom he owed money, but his nomination as Attorney General succeeded.

As one might imagine, history is replete with instances of ethical improprieties by presidential appointees. For example, Samuel Swartwout, chief customs inspector for the Port of New York (a federal appointment) stole $1.2 million from 1829 to 1838, before fleeing to England.[30] (We are talking here about early nineteenth-century dollars.) Reverdy Johnson, Attorney General under President Zachary Taylor, ordered the payment of $235,000 to settle a claim against the U.S. government—without revealing that he himself, in private practice, had received a fee of $95,000 to represent the very claimant on the identical claim.[31] Just before the Gold Panic of 1869, which was caused by the federal government's decision to place millions of dollars worth of gold up for sale, the assistant treasurer of the United States borrowed $1.5 million to

30. ROBERT N. ROBERTS, WHITE HOUSE ETHICS: THE HISTORY OF THE POLITICS OF CONFLICT OF INTEREST REGULATION 8 (1988).

31. *Id.* at 9-10.

speculate in the gold market, and the President of the United States, Ulysses S. Grant, wrote to his own sister and urged that her husband—an associate of financier Jay Gould—get out of the market.[32]

I mention these instances for a reason: they illustrate the concept of "honest graft" that dominated the second half of the nineteenth century and is raised even today, albeit not under that name, by almost any President whose associates are accused of unethical activity. "Honest graft" was the name given to the use of one's government service to benefit one's friends and clients. It was graft because it was unseemly, but it was honest because it was not against the law. ("Dishonest graft" encompassed bribery and the like.) Nowadays, honest graft frequently *is* against the law, as it should be, which leads to one of our principal confusions about the role of ethics in government: when investigation (for example, by an independent counsel) determines that an office-holder has violated no *law*, we treat that result as a vindication. We forget in our investigations of the already confirmed what we try hard to remember in our investigations of the nominated: a wrong that is not illegal may yet be unethical, and a wrong that is unethical, unless balanced by some positive good, should serve as a bar to public service.

Category 5—Illegal Conduct: It might seem surprising that I have (tentatively) placed this category last, but, as will become clear, there are reasons for it. Obviously, we should be wary about staffing the government with people who have broken the law. It is possible to be Holmesian about the law and see it as putting the citizen to a choice—obey the law or pay the penalty—which leads to an image of societal indifference as to whether the law is actually broken as long as the criminal is punished. But criminal laws are not tort laws; their purpose is to deter crime, not to force the criminal to internalize the costs of his or her activities. Put otherwise, a law is a moral statement and its violation often an immoral act.

Nevertheless, it would be an error to ban from government service anyone who had ever broken any law, and violations of law should often be curable. A ticket for driving fifty-eight miles per hour in a fifty-five mile-per-hour zone simply is not in the same category as a conviction for beating one's spouse. One must see violations as existing along two axes—the importance of the law itself and the severity of the violation. In fact, we might need to plot the problem in three dimensions, because illegalities near the core of the duties we expect the nominee to perform might be more serious than illegalities in areas wholly divorced from those duties.

32. *Id.* at 14-15.

Thus, in addition to asking whether the nominee has violated any laws, we must determine whether the law involved is related to the task for which the individual has been nominated, whether those violations are consequential or inconsequential, how those who violate the laws in question are generally treated (which tells us something about the depth and profundity of moral judgment that the laws involve), and whether the nominee has made appropriate amends for the illegality. What I have in mind is not, strictly speaking, a balancing test—I am not proposing that each of these questions must receive a particular answer in order for a "no" vote to be justified—but inquiries of this kind must be undertaken before we can decide how much weight to give to the underlying violation of law.

With this test, some violations would never be curable. Murder, rape, armed robbery—conduct that might reasonably be described as *malum in se* rather than *malum prohibitum*—would obviously fall into this category. Adultery (illegal in many states) probably would not. Illegal drug use might be somewhere in the middle. True, Douglas Ginsburg, when nominated for the Supreme Court, was pilloried for marijuana use many years before, and zero tolerance might after all be the most sensible policy. But it blinks at reality to deny, given the self-indulgence of the "baby-boom" generation, that our government is likely chock-full of people who tried drugs as teens or even as adults. In all likelihood, many of our public servants use drugs now—a scary thought, but one that seems statistically correct.

Although legal violations surrounding her employment of a nanny shot down Zoe Baird, it does not appear after all that this will be taken to disqualify all future candidates. (I have already mentioned that there are other Clinton appointees with similar legal difficulties.) Perhaps the laws that Baird violated should not fall into the category of automatic disqualifications; on the contrary, perhaps they should be easily curable. In which case, our national silence on the "nannygate" violations of other government officials might be our way of admitting that we are ashamed of the way we acted the first time around.

Summary: Lest we forget, categorizing the wrong that the candidate has done is not the end of the story. For my basic proposal is that we should balance what good the candidate might do when serving in the position against the evil that the putatively "disqualifying" factor represents. To summarize, then, there are five categories of potentially disqualifying facts, which I have listed in order of the ease of cure:

1 — Lack of qualifications	Not curable
2 — Loss of public respect	Rarely curable
3 — Deeply immoral conduct	Sometimes curable
4 — Unethical conduct	Often curable
5 — Illegal conduct	Frequently curable

Looking at recent nomination battles, then, one would say, for example, that Zoe Baird was in Categories 2 and 5, Clarence Thomas possibly in Category 3 and certainly in Category 2, and Edwin Meese possibly in Category 4. Robert Bork, although his nomination was defeated, fell into only Category 2. Thurgood Marshall, whose nomination was vehemently opposed by conservative activists, fell into none of these categories. Opponents of both men tried to paint them as fitting into Category 3, and, in Marshall's case, Category 1. That similarity might help explain why Marshall has been quoted to the effect that he thought Bork was badly treated.

VII. CONCLUSION

I have argued that the search for disqualifying factors takes us down a dangerous road. I have further suggested that if we are to play that game, we should do it right, which means struggling for consistency and striving for a sense of balance. People, after all, are complicated, and the wrongs that we do in our lives are only part of our characters.

The American mind, someone has written, is literal, like the minds of the illiterate tend to be. Americans are less ideological than pragmatic, and, therefore, value the concrete over the abstract—the plain meaning over the metaphor. That, perhaps, is why we often show so little patience with wrongdoing by those who are in public life: we are unable to get our minds around such abstractions as the concept of sin.

We think of sin as wrongdoing—the violation of some duty, whether written down somewhere or not—which means that we reject the concept of sin as something that is ever-present in all of us. Because we reject that concept in our national dialogues over morality, we are unable to encompass in those dialogues the more complex metaphorical possibilities of contrition, redemption, and forgiveness. Although, as many readers will know, I did not believe Clarence Thomas' denials of Anita Hill's charges and therefore did not think he should have been confirmed, I would genuinely rather live in a world in which a Thomas who found himself able to say, "Yes, it happened, and I am terribly sorry, but it was a long time ago in a difficult time and I am a different man" might have found an audience willing to listen. Listening, even forgiving, does not entail

reward. A world in which people might have listened would not necessarily be one in which his contrition would have led to his confirmation. But the question before the Senate would then have been, empirically, a prediction of future behavior—metaphorically, a judgment on the sincerity of his contrition—rather than a need to impose punishment for his past.

We do have an alternative to the way that we have been doing business lately. We try, perhaps for the first time in our history, to treat public service as a calling rather than a reward. Rather than thinking of service on the Supreme Court or at the Justice Department as a chance to add points to one's resume, we can treat it as an opportunity to labor on behalf of one's country, to offer a fair return for what the nation has given. The question, then, should not be whether the nominee "deserves" the position, as though the job is a quid pro quo for years of moral rectitude. The question should be whether this person is capable of honorable service of which, in the future, we will be glad.

Or we can go on as we have been. We can refuse to develop a sense of balance and we can continue to provide incentives to lie and conceal. We can say to those who are nominated to serve us that the best strategy, if accused of any wrongdoing, is to stonewall if possible, to lie if necessary—for we will reward you if you allow us to continue deluding ourselves, but we will never forgive you if you force us to face our own very human capacity for sin.